

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24703

Docket Number MW-24666

Ida Klaus, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(Burlington Northern Railroad Co. (former
(St. L&is-San Francisco Railway **Company**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the position "**Operator Dismantling Plant**" as advertised by Bulletin No. ED-69 dated January 12, 1981 was awarded to an applicant junior to **Trackman H. D. Barger** (System File **B-804/MWC 81-6-30B**).

(2) (a) The position referred to in Part (1) hereof be awarded to Mr. **H. D. Barger**;

(b) Claimant Barger shall be allowed eight (8) hours of pay each work day beginning January 6, 1981 and continuing until the violation is terminated.

OPINION OF BOARD: In early January, 1981, the two machine operators at the Dismantling Plant became indefinitely unavailable for service. The Assistant Chief **Engineer** asked **Trackman Boyd** about his interest in qualifying for the operator position. Boyd indicated his willingness, and he began to be used as an operator on January 6. The operator position was then bulletined under Rule 36 procedures on January 12, 1981. The claimant and **Boyd** applied; Boyd was assigned.

The claimant held seniority as a **trackman** over **Boyd**. In the month preceding the initial invitation to Boyd, the claimant had **worked** nine days at the Dismantling Plant. While **Boyd** was qualifying, the claimant advised the **Assistant Chief Engineer** of his greater seniority and asked to be allowed to work the operator position. The request was denied, apparently without explanation to the claimant.

The claim alleges that the award of the position to the junior **trackman** violated agreement provisions relating to promotions, particularly Rule 33. It maintains that the claimant had **shown** sufficient "**ability** and merit" to be considered qualified by reason of his prior satisfactory service at the Dismantling Plant. It charges improper preferential treatment of Boyd.

The Carrier challenges the claim on **two** grounds: With respect to Rule 33, it argues that, although senior, the claimant did not meet the established "**ability**" standard for the particular position **because** he was not qualified by prior service as an operator at the plant, having **worked** there only as a trackman. In any event, the Carrier maintains, Rule 33 is inapplicable here, for it is Rule 22 that governs the propriety of its conduct. It relies on paragraphs (a) and (c) of Rule 22, which read:

"(a) **Employees** selected by management will be permitted an opportunity to qualify on machines or power tools covered by this agreement during their regular assigned **hours**.

(c) In promoting employees to fill positions of monthly rated operators covered by paragraph (a) (1) of Rule 8, preference will be given employees who have qualified for the position."

Under the two paragraphs, the Carrier argues, it enjoys **full** freedom to pick any employee to qualify but it is then subject to the obligation to give that employee preference for the position if he does qualify. In its view, the propriety of its selection of **Boyd** to qualify is thus beyond question, as is the preference later accorded him for the position. Moreover, the Carrier adds, it had good **and** sufficient reason on the basis of relative work "characteristics" to prefer Boyd over the claimant for the initial opportunity to qualify.

Upon careful consideration of the record and the arguments before it, the Board concludes that the Carrier's position, whether based on Rule 22 or Rule 33, does not withstand fair and rational analysis.

We cannot agree that the Carrier's unquestioned managerial right under Rule 22 (a) to select employees to qualify for higher positions can reasonably be interpreted to permit absolute and unrestrained exercise of that authority, without regard to its impact on significant allied employee rights. Indeed, the Carrier has not adhered with full conviction to that position, as is evident from its **efforts** to defend its action here as fair and reasonable.

We do not however, find those efforts to be persuasive. We conclude that the Carrier improperly exercised its authority.

Third Division Awards Nos. 21858 and 22051, cited by the Carrier as precedent here, are not applicable. They concern selection of employees, on other properties under other agreements, for overtime work.

It is our opinion on the evidence before us, particularly the sequence of events leading to the award of the operator position to the junior employee, that the Carrier arbitrarily ignored the fact of the claimant's availability when it offered the junior **trackman** the opportunity to qualify.

There is a reasonable likelihood that the claimant's greater seniority and prior experience in the Dismantling Plant, even as a **trackman**, would have earned him the opportunity to qualify had he been given any consideration at all.

In consequence, the Claimant was effectively blocked from access to the opportunity, afforded him by Rules 31 and 33, to advance by promotion to the operator position on the strength of his seniority. In a word, his treatment under Rule 22(a) "as unfair. It thus follows that the selection of the junior employee to qualify under Rule 22 (a) "as similarly unfair and that his subsequent assignment to the operator position accordingly "as improper.

We are not persuaded that the Carrier is seriously pressing its Rule **22(c)** obligation in view of its pursuit of the Rule 36 procedures for filling the vacancy in the operator position by promotion in accordance with the standards prescribed by Rule 33. In any event, the Rule 22(c) argument must also fall because the unfair selection to qualify did not give rise to a valid obligation to accord the junior employee preference.

In view of all the foregoing, we find that the Carrier violated Rule 22(a) **and** Rule 33 by the selection of the junior employee. We turn to the remedy question.

We find insufficient support in this record for reversing the Carrier's determination that the Claimant "as not qualified under Rule 33 for assignment to the operator vacancy when he applied. Even though he "as unfairly denied the chance to become qualified, we see no compelling basis in **this** record for nevertheless directing the claimant's placement in the position at this time. We believe that the more reasonable course in these particular circumstances is to direct the **Carrier** to afford him a fair opportunity to qualify and, if he qualifies, to place him in the position as of the date on which the junior employee "as assigned **and** pay him the amount he **would** have earned on the position **from** that date, less any **amount** he earned in his other employment.

, **FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved **June 21, 1934;**

That this Division of the Adjustment **Board** has jurisdiction **over** the dispute involved herein; and

That the Agreement was violated.

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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois this 9th day of March, 1984

